STB FINANCE DOCKET NO. 33989

PEJEPSCOT INDUSTRIAL PARK, INC., d/b/a GRIMMEL INDUSTRIES–
PETITION FOR DECLARATORY ORDER

Decided May 9, 2003

The Board, on court referral, issues a declaratory order concluding that the respondent railroads have violated their common carrier obligation for a certain time period by failing to provide a rate for service upon specific request by a shipper.

BY THE BOARD:

Pejepscot Industrial Park, Inc., d/b/a Grimmel Industries (Grimmel or petitioner) seeks a declaratory order finding that Maine Central Railroad Company, Springfield Terminal Railway Company, and Guilford Transportation Industries, Inc. (collectively, MEC or respondents) violated 49 U.S.C. 11101 by refusing to provide rail service to Grimmel upon reasonable request. The matter has been referred to the Board by the United States District Court for the District of Maine, in Civil Action No. 99-112-P-C, *Pejepscot Industrial Park, Inc., d/b/a Grimmel Industries v. Maine Central Railroad Co., Springfield Terminal Railway Co., and Guilford Transportation Industries, Inc.* The court stayed its proceeding pending our determination of the common carrier service issue, count 3 of Grimmel's complaint.[1]

A declaratory order proceeding was instituted to address the referred matter. Grimmel's petition was accepted as an opening statement, and we established a

[1] In its amended court complaint, petitioner alleges that: Grimmel, not respondents, owns and possesses the legal right to use the spur track serving Grimmel's facility at Topsham, ME (count 1); respondents should be enjoined from interfering with Grimmel's rights to use that track (count 2); respondents unlawfully refused to provide common carrier rail service to its facility (count 3); respondents breached their contractual duty with the State of Maine to provide rail freight service to Grimmel as a third-party beneficiary of that contract (count 4); respondents breached their contract with Grimmel by failing to provide service after Grimmel accepted an offer of service at a quoted rate (count 5); and respondents wrongfully interfered with Grimmel's business opportunities (count 6).

procedural schedule for further filings. Respondents filed a reply and a cross-petition. Grimmel filed a rebuttal and a reply to respondents' cross-petition.

BACKGROUND

Grimmel states that, in January 1991, it purchased an abandoned paper mill in Topsham, ME, and, upon incorporating as Pejepscot Industrial Park, Inc., began the business of salvaging, selling, and shipping scrap metal and automobile shredder residue (ASR) at that location. A section of track approximately 3,000 feet in length (the Spur) connects Grimmel's facility to a section of respondents' line known as the Lewiston Lower Road (Lewiston Lower or the Line), which runs between Brunswick and Lewiston, ME. The Line connects with other rail lines in Brunswick, but is stub-ended and has no connections in Lewiston.

The Maine Department of Transportation (MDOT) in 1991 purchased the physical assets of a 9.4-mile portion of the Line between Brunswick and Lisbon Falls, ME,[2] with the intention of possibly developing passenger rail service. Although MDOT assumed ownership of that portion of the Lewiston Lower, MEC retained the right and statutory obligation to provide common carrier freight service over it through an easement. The easement agreement provides that, so long as the State has not commenced passenger operations on the Lewiston Lower, MEC will continue to be responsible for maintaining it and providing rail freight service. The agreement specifies that MEC's easement would end only if and when our predecessor, the Interstate Commerce Commission (ICC), were to relieve MEC of its common carrier obligation to provide rail freight service on the Line.[3] *See* Freight Easement Agreement, section 2.3, attached to Petitioner's reply statement.

[2] Topsham is located on this portion of the Lewiston Lower.

[3] Based on the freight easement agreement and the other circumstances surrounding the sale to MDOT, the ICC found that its approval was not needed for MDOT to purchase the underlying property and track material, because no common carrier rights or obligations were transferred. *See Maine, DOT – Acq. Exemption, ME. Central R. Co.*, 8 I.C.C.2d 835, 837 (1991) (*State of Maine*) ("MEC has both the intent and unconditional ability to continue to assume and exercise its common carrier rights and obligations").

No traffic has moved over the Lewiston Lower in more than a decade.[4] MEC states that the Line sustained flood damage in 1986, and it concedes that it has allowed the Line to deteriorate over the past several years. According to the record, however, MEC has never issued an embargo notice for the line[5] or received authority from the ICC or from us to abandon or discontinue service over it.[6]

Grimmel claims that it sought to obtain rail service directly from its Topsham facility beginning in 1994, but that MEC declined to provide such service unless Grimmel met one of two preconditions. First, according to Grimmel, MEC demanded that Grimmel supply $250,000 – the amount respondents allege was necessary to return the Lewiston Lower to operating condition – before MEC would agree to provide service. *See* V.S. of Timothy J. Garrity (Garrity V.S. I)[7], Exhibit C to Grimmel's petition for declaratory order, at 4 (respondents told us "* * * that we would have to fund $250,000 in repairs to the track from Brunswick to Lisbon to restore service on the line * * *"). *See also* respondents' reply at 4 (respondents "advised Grimmel from the outset that the Lewiston Lower required not only $250,000 in rehabilitation but also ongoing maintenance") (footnote omitted). Second, as an alternative, respondents suggested that they would provide service if Grimmel would enter into a "take or pay" contract wherein the shipper would commit a minimum amount of traffic or revenue sufficient to cover respondents' costs in restoring,

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[4] *See* verified statement (V.S.) of Allan H. Bartlett, of MDOT, originally submitted in Docket No. AB-83 (Sub-No. 16X) and appended as Exhibit D to Grimmel's petition for declaratory order, at 2 ("The Lewiston Lower Road has been out of service for many years. To my knowledge, Guilford [the parent company of MEC] has not provided service or conducted maintenance on the line since 1987"). *See also* respondents' reply at 3 ("[t]he Lewiston Lower and the [S]pur sustained significant structural damage during a flood in 1986. There may have been some rail service thereafter but none after the end of the 1980s").

[5] An embargo notice is a unilateral declaration by a carrier that it temporarily will suspend service over a part of its system. Typically a notice is issued when the carrier temporarily is unable to provide service because of damage to the line or some other impediment to service. An embargo is not considered to be unreasonable unless it remains in effect longer than necessary to remove the impediment.

[6] As discussed below, MEC filed a notice of exemption to abandon the entire Lewiston Lower in 1998, but after the State of Maine made about $150,000 worth of improvements to the Line between Brunswick and Lisbon Falls, MEC withdrew its notice.

[7] Mr. Garrity, General Manager of Grimmel, submitted two verified statements, one executed on September 18, 1999 (V.S. I), and the other executed on May 1, 2001 (V.S. II).

and providing service over, the Line from Topsham.[8] Grimmel did not accept either of the respondents' alternative preconditions.

Although Grimmel did not agree to respondents' preconditions, it did continue its efforts to obtain rail service directly from its plant. Grimmel and certain purchasers of its products contacted respondents at various times to obtain rates for rail service from Topsham and other Maine locations. On at least one occasion (in June 1996) Grimmel specifically asked MEC for a rate for the transportation of scrap metal and ASR from Topsham to Steelton, PA. *See* V.S. of Kenneth Berg (Director of Marketing for Springfield Terminal Railway Company), attached to respondents' reply, at 2.[9] MEC responded to this rate request only after it had responded to a separate but related rate inquiry from one of Grimmel's business partners, Dirk Delgrego of Tube City, Inc., for service from Grimmel's plant at Topsham. Mr. Berg testifies that, in his conversation with Mr. Delgrego, Mr. Berg explained that it was his understanding that there was no rail access at Topsham. *Id.* at 3. Having conveyed his understanding about the unavailability of rail service directly from Topsham, Mr. Berg quoted by fax to Mr. Delgrego a rate of "about $850 per car" for rail transportation from the "Topsham area" on June 25, 1996. Berg V.S. at 2-3 and Exh. 1. The next day, Mr. Berg, "based on [his] discussions with Mr. Dirk Delgrego," orally quoted to Mr. Garrity, for through movements involving other carriers, "a rate of $2120 per car * * * of which [respondents] would have received approximately $850." *Id.* at 2.

Grimmel states that, frustrated by its fruitless efforts to obtain rail service at Topsham, it approached the State of Maine in June 1997 to see if the State could help resolve the matter. Following negotiations between the State and MEC in 1998, petitioner claims that MEC agreed to seek authority to abandon the entire Lewiston Lower with the understanding that, after the abandonment, MDOT would purchase the portion of the Lewiston Lower that it did not already own. MDOT would then rehabilitate the Lewiston Lower from Topsham to

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[8] MEC persuaded Grimmel for a time to transport its product by truck from Topsham to Portland, ME, for tender to MEC at that point. MEC states that it terminated this truck "transload" arrangement "in or about" January 1997 (V.S. of F. Colin Pease, attached to respondents' reply, at para.12, third [unnumbered] page), after MEC demanded that Grimmel pay to install an impermeable loading pad to prevent Grimmel's freight from polluting MEC's yard, and Grimmel declined to do so.

[9] Respondents also indicate that, although Grimmel and certain of its business partners contacted Mr. Berg on later occasions to ascertain the rates for movement of scrap metal and ASR from Topsham to various locations, respondents never established a Topsham rate pursuant to these inquiries. *Id.* at 3, 5-6.

Brunswick, so that Grimmel could be served by a railroad that MDOT would designate to operate over the Line. According to Grimmel, consistent with this agreement, MEC filed a notice of exemption with the Board in June 1998 to abandon the entire Lewiston Lower.[10] In reliance on MEC's agreement to abandon the Line, but before MEC effectuated the abandonment, MDOT spent $150,000 rehabilitating the Topsham to Brunswick portion of the Line. At the time MDOT was undertaking these repairs, Grimmel states that it proposed to acquire respondents' asserted interest in the Spur, and to repair and upgrade the Spur. According to Grimmel, MEC rejected the proposal, and threatened to tear up the Spur and sell it for scrap.

In August 1999, more than a year after filing its abandonment notice, MEC asked to withdraw the notice. In a decision served on September 15, 2000, over the objections of Grimmel and MDOT, we granted MEC's withdrawal request.[11] Although the State agency spent $150,000 repairing the Lewiston Lower, the record before us today in this proceeding indicates that the Line remains inactive.

In summary, Grimmel claims that MEC failed to provide rail service directly from its Topsham facility in spite of numerous requests that it do so. The petitioner argues that MEC had and continues to have a duty to repair the Lewiston Lower and provide rail service over it pursuant to both its common carrier obligation under 49 U.S.C. 11101 and its contract with MDOT. Finally, Grimmel contends that MEC has no basis upon which to deny service from its Topsham facility.

Respondents claim that they sought to work with Grimmel to arrange for the movement of its products, and that they never refused to provide rail service from Topsham. They assert, however, that they have no obligation to provide rail service at a loss, and that, despite their efforts to meet petitioner's service needs in other ways, Grimmel has acted unreasonably by demanding that MEC

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[10] For the 9.4-mile portion of the line that already had been purchased by MDOT, MEC was planning to abandon its easement (and the attendant obligation) to provide common carrier service. For the remainder of the Lewiston Lower, MEC intended to abandon all of its interests. The notice of exemption became effective on July 31, 1998. On that date MEC could abandon the line, although it was not required to do so under the ICC Termination Act of 1995 or Board regulations.

[11] *Maine Central R.R. Co. – Abandonment Exemption – in Androscoggin Co., ME*, STB Docket No. AB-83 (Sub-No. 16X) (STB served September 15, 2000) (*MEC Aband. Exemption*). In that decision, we explained that, because our abandonment authority is permissive, denial of MEC's request to withdraw its notice of exemption would not give petitioners the relief they sought, namely, divestiture of MEC's interest in the Line. We also noted that other procedures were available to Grimmel and MDOT – such as filing a third-party abandonment request or a feeder line application – that could facilitate their goal of a forced divestiture of MEC's interest in the Lewiston Lower.

bear all or most of the line's rehabilitation costs. Respondents also maintain that Grimmel's service complaints are unavailing because the particular commodities Grimmel wants to ship, i.e., iron and steel scrap and ASR, have been exempted under 49 U.S.C. 10502 (formerly 49 U.S.C. 10505) from the regulatory requirements of 49 U.S.C. 10101-11908, citing *Rail General Exemption Authority–Exemption of Ferrous Recyclables*, 10 I.C.C.2d 635 (1995) (*Ferrous Recyclables*), and *Rail General Exemption Authority–Nonferrous Recyclables*, 3 S.T.B. 62 (1998) (*Nonferrous Recyclables*). Respondents also argue that most, if not all, of Grimmel's claims are barred by the statute of limitations. Finally, respondents request that we issue a declaratory order pertaining to the issues in counts 4 and 6 of Grimmel's amended complaint before the District Court.

DISCUSSION AND CONCLUSIONS

Preliminary Issue – Commodity Exemptions for Scrap Metal and ASR

We will first address respondents' contention that the alleged violations of its common carrier obligation must fail because the commodities at issue here have been exempted from all regulation. We address this at the outset because, if the contention is correct, there could be no violation of MEC's common carrier obligations here, at least during the time that the exemptions have been in force. The exemption of a commodity under 49 U.S.C. 10502[12] generally excuses carriers from virtually all aspects of regulation involving the transportation of that commodity. This includes the dual requirements that a carrier furnish rates and provide service on reasonable request pursuant to those rates. Thus, even if a carrier's conduct would constitute a statutory violation during a period of regulation, the exemption bars regulatory relief during the period when the exemption is in force. *See Consolidated Rail Corp.– Declaratory Order –*

[12] In directing the ICC (and now the Board) to use this exemption authority to relieve the transportation industry from unnecessary regulation, Congress suggested a trial-and-error approach, with the agency liberally exempting carriers from regulatory requirements and reviewing carrier actions after the fact to correct abuses of market power. *See* H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980) (Conference Report for the Staggers Rail Act of 1980). The ICC's exemption for ferrous recyclables (such as scrap metal) and our exemption for nonferrous recyclables (such as ASR) are in keeping with that directive. Both of these exemptions were based on the low rail rates typically charged for transporting these commodities and the widespread competition generally available from trucks and barges to haul them. In both instances, the facts reflected that railroads were, in general, losing market share to competing modes of transportation, indicating that railroads lacked market power to abuse shippers.

Exemption, 1 I.C.C.2d 895 (1986) (*Conrail Declaratory Order*), *aff'd sub nom. G&T Terminal Packaging Co., Inc. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1235 (3d Cir. 1987).[13] As of the effective dates of the exemptions, then, the transportation of scrap iron and steel and ASR was no longer regulated.[14] However, prior to these effective dates, MEC was subject to the common carrier requirements set forth in 49 U.S.C. 11101, contrary to its unsupported assertions.

What this means for the case at hand is that MEC's actions could at most constitute a violation of its common carrier obligations only prior to the effective dates of the respective exemptions, specifically: (a) June 18, 1995, for scrap iron and steel; and (b) May 21, 1998, for ASR. There can be no violation of the common carrier obligation under section 11101 after these dates, regardless of

[13] Petitioner argues that an exemption typically applies only to rates and does not relieve a railroad of its common carrier obligation to provide equipment and service on reasonable request, citing *Battaglia Distribution Company, Inc. v. Burlington Northern Railroad Company*, Finance Docket No. 32058 (STB served June 27, 1997), slip op. at 5 n.13 (*Battaglia*). However, *Battaglia* involved commodities moving in boxcars, and as to such traffic, the ICC had expressly retained authority "to enforce the railroads' obligation as common carriers to supply boxcar equipment to shippers for loading upon reasonable request," in *Exemption from Regulation – Boxcar Traffic*, 367 I.C.C. 424, 455 (1983). In marked contrast, neither *Ferrous Recyclables* nor *Nonferrous Recyclables* contained a comparable reservation of regulatory oversight. Instead, both decisions broadly exempted the commodities "from the provisions of 49 U.S.C. Subtitle IV," including the common carrier service obligation. *Ferrous Recyclables*, 10 I.C.C.2d at 646; *Nonferrous Recyclables*, 3 S.T.B. at 63 ("exempt from all regulation except the maximum rate provisions of 49 U.S.C. 10701 *et seq.*"); 49 CFR 1039.11(a).

[14] The exemptions, however, do not extinguish the Board's subject matter jurisdiction over such transportation, nor do they activate any common law causes of action related to common carriage. *See Conrail Declaratory Order* at 898. Rather, the commodities are merely excluded from our regulatory review unless and until we are persuaded to revoke the exemption, either completely or in part.

respondents' action or inactions.[15] With these exemptions in mind, we will now turn to the issues the court asked us to address.

Common Carrier Obligations

It is undisputed that MEC is a common carrier, and that its obligations as a carrier extend to shippers of non-exempted commodities on the Lewiston Lower.[16] As a common carrier, MEC has two interconnected obligations under section 11101. First, it must provide written common carrier rates to any person requesting them. 49 U.S.C. 11101(b). Second, it must provide rail service pursuant to those rates upon reasonable request. 49 U.S.C. 11101(a). These requirements are linked, because a rate is a necessary predicate to any specific request for service.[17] Without rates, and any attendant terms setting forth the

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[15] This does not mean that a railroad customer is without an avenue of relief in such circumstances. Notwithstanding the findings that the agency has already made that, in most circumstances, regulation is not necessary, Grimmel could come to the agency and seek to have the exemptions revoked, pursuant to 49 U.S.C. 10502(d), at least as to shipments from Topsham. If granted, respondents would then again have a common carrier obligation to furnish rates and service upon request for scrap metal and ASR. To obtain revocations, Grimmel would need to demonstrate that regulation of each commodity is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. The fact that there was a failure to provide rail service upon request – even a failure for which damages could be awarded during a period of regulation – would not mean that the exemption must be revoked as to that carrier and regulation restored. Rather, in deciding whether to revoke the exemption, we would look at whether the shipper lacks sufficient intermodal alternatives and whether the carrier has market power that it could abuse with respect to the traffic, thus necessitating regulatory oversight.

[16] The commodity exemptions notwithstanding, MEC does not deny that it possesses the common carrier obligation to provide rates and service upon request for all commodities that have not been exempted. Indeed, in withdrawing its abandonment notice for the entire Lewiston Lower in *MEC Aband. Exemption*, MEC acknowledged that "[a]s a common carrier, [it] will continue to have obligations to provide service on the line upon reasonable demand if this abandonment is withdrawn." MEC rebuttal, filed October 4, 1999, in STB Docket No. AB-83 (Sub-No. 16X), at 9-10. Also, as the ICC confirmed in *State of Maine*, 8 I.C.C.2d at 837, MEC today has a common carrier obligation pursuant to 49 U.S.C. 11101 to provide rail service over the Lewiston Lower on reasonable request, and to establish rates therefor, when the request is to transport commodities that have not been exempted from regulation.

[17] All common carriers have a fundamental obligation to establish rates for their services. *See, e.g., Arizona Electric. Power Coop. v. Burlington Northern & Santa Fe Ry, et al*, 5 S.T.B. 531 (2001) (*Arizona Elec.*), at 532 ("railroads have a general duty under 49 U.S.C. 11101(b) to establish common carrier rates upon request"); *Western Resources, Inc. v. The Atchison, Topeka and Santa Fe Ry. Co.*, STB No. 41604 (STB served May 17, 1996), slip op. at 4-5 (a railroad's common carrier obligation requires it to comply with any reasonable request for service as well as shipper requests (continued...)

particulars of service, a shipper cannot make a specific service request. It is axiomatic that a rail carrier may not indirectly avoid its common carrier obligation to provide service by evading its obligation to establish rates upon request.[18]

It is also undisputed that Grimmel sought rail service directly from its Topsham facility beginning at about the same time that the facility became operational in 1994, and that it consistently expressed its desire to have such service thereafter. Furthermore, although MEC never issued a flat refusal to provide service, it is undisputed that no rail service was ever provided directly from Grimmel's facility. Instead of establishing rates and providing service, the railroad offered a number of explanations as to why it should not have to do so.

There are two primary issues that we must address. First, were Grimmel's actions in seeking rail service from its Topsham facility specific enough to trigger MEC's pre-exemption common carrier obligations to provide rates/service and, if so, did MEC comply with these obligations? Second, under the particular circumstances of this case, are the explanations provided by MEC sufficient to relieve it of its pre-exemption common carrier obligations under 49 U.S.C. 11101? As discussed below, at least during the period when the commodities at issue were not exempted from regulation, MEC's failure to provide rates/service from Topsham in response to a specific request from Grimmel constituted a violation of its pre-exemption statutory obligations under section 11101.

With regard to the first issue, there is no doubt that Grimmel regularly expressed a desire for rail service from its plant. The record is replete with references to various conversations in which Grimmel and/or its trading partners discussed in general with MEC the prospect of service from Topsham. Clearly, MEC knew that Grimmel wanted service. Whether Grimmel's general expressions of interest in receiving rates and service, standing alone, would be sufficient to trigger MEC's common carrier duties may be a close call. We need not resolve that issue here, however, because the evidence before us establishes that Grimmel's generally expressed desire for rates/service did, in fact, manifest

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[17](...continued)
for rates).

[18] In its referral order, the court specifically asked for our views on whether respondents failed to provide *service* upon reasonable request in violation of section 11101(a). Before we could reach the service issue, however, we would first have to find that respondents supplied Grimmel with a rate pursuant to which service could be provided. If the record shows that no rate was supplied, it would serve no purpose to address the service issues.

itself in a specific request for rates for the transportation of ASR and scrap metal on June 18, 1996. On that date, according to respondents' own testimony, Grimmel requested a rate for the movement of ASR and scrap metal from Topsham to Steelton, PA. Berg V.S. at 2. That specific request triggered MEC's statutory duty as a common carrier to establish a rate for transportation of ASR in response, and, thereafter, provide service. This duty applied only to ASR, because, as noted above, the transportation of iron and steel scrap was exempted from regulation in 1995. Because the first record of any rate request is well after 1995, we limit our review to requests for rates for ASR, which was not yet an exempted commodity.

Respondents did not, however, provide a rate, or even a preliminary rate quote,[19] for rail service from Topsham in response to Mr. Garrity's request on June 18. Rather, on June 26, 1996, Mr. Berg made a vague oral quotation to Grimmel of $2,120 per car (for a shipment over the lines of multiple carriers, of which he said MEC would receive "approximately $850") for carriage "from Topsham." Although superficially responsive to Mr. Garrity's request, our examination of Mr. Berg's testimony and the quote itself show that the rate quote did not apply to rail service directly from Grimmel's Topsham facility at all. Rather, it was a quote for service from the "Topsham area," which did *not* include Grimmel's plant at Topsham.

We conclude that MEC did not mean for the term "Topsham area" to encompass the Grimmel facility based on the context in which the rate quote was made. Mr. Berg prefaces his testimony concerning the quote to Grimmel by asserting that the "common practice" in the rail industry for a shipper who "lacks a suitable siding and access to a rail line [is] to truck its goods to a nearby public delivery siding for loading onto rail cars." Berg V.S. at 2. In addition, Mr. Berg made clear that his oral quote to Grimmel was based on a contemporaneous discussion with another customer, Mr. Delgrego of Tube City, about movements

[19] Mr. Berg explains that it is a common practice for the railroad, as an initial response to a request for a rate, to supply a hypothetical rate "quote." As we understand respondents' practice, if the rate quote is acceptable to the requestor, it will then be followed by a formal rate conforming to 49 U.S.C. 11101(b) and our regulations at 49 CFR 1300.1 *et seq.* Although respondents' practice of quoting rates prior to establishing them is not specifically sanctioned by the statute or our regulations, we have previously indicated that our regulations should permit the prompt and informal exchange of rate information, consistent with the apparent objective of respondents' practice, to reduce the burdens on carrier and shipper alike. *See Disclosure, Pub. & Not. of Change of Rates--Rail Carriage*, 1 S.T.B. 153, 156-57 (1996).

from Grimmel's Topsham facility.[20] In that discussion, Mr. Berg expressed his understanding that "there was no siding or rail access in Topsham" (*id.* at 3), reflecting that, in Mr. Berg's view, MEC rail service was not available from Grimmel's plant.[21] Mr. Berg then states that he did not discuss with Mr. Delgrego "how access to Topsham might be accomplished" (*id.*), again leading us to conclude that MEC had already decided it would not provide service directly from Grimmel's facility. In light of this, the purported "Topsham" quotes to both Tube City and Grimmel were most likely an attempt to accommodate Grimmel and Tube City by proposing a rate for an alternative service – specifically, service from some "Topsham area" location at which (unlike Topsham itself) MEC already was providing rail service – rather than for the requested service directly from the plant.[22]

Reading Mr. Berg's testimony in conjunction with that of respondents' Mr. Pease demonstrates that, even to the extent that the quoted "Topsham area" rates might conceivably extend to points along the out-of-service Lewiston Lower, MEC "conditioned the effectiveness of such rates upon Grimmel identifying a satisfactory service location."[23] In addressing the lack of a "satisfactory service location" along the Lewiston Lower from which to provide service to Grimmel, respondents admit that "[t]he [S]pur could be such a location [but] only if the Lewiston Lower were in a condition that would permit [respondents] to reach the [S]pur."[24] That further convinces us that Mr. Berg's quote to Grimmel was at best an offer to provide service from some point in the area to which, unlike Grimmel's plant, MEC was willing to provide service. Taken in the context of the record before us, the rate quote to Grimmel did not respond directly to Grimmel's specific request for a rate for service from its facility at Topsham.

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[20] Mr. Delgrego initially sought rates for the movement of ferrous scrap from Portland, ME, to Barbers Station, MA, but in ensuing discussions with Mr. Berg (on June 24 or 25), he also expressed an interest in rates for service directly from Grimmel's Topsham facility. *Id.* at 2-3.

[21] Mr. Berg's discussion with Mr. Delgrego did not result in a rate quote for service from Topsham. Instead, on June 25, 1996, Mr. Berg offered Tube City a faxed "Topsham area" quote of "about" $850 per car – the same amount that Mr. Berg orally quoted to Grimmel the very next day. On the basis of Mr. Berg's testimony that there was no rail access at Topsham, it appears to us that the "Topsham area" quote excluded Topsham itself. In that regard, Mr. Berg's vague Topsham *area* rate quote simply does not square with the Topsham-specific requests of both Messrs. Delgrego and Garrity.

[22] For example, Mr. Berg testifies that his "Topsham area" quote to Mr. Delgrego could apply to rail service from Brunswick, ME (*id.* at 3), a location at which, unlike points along the Lewiston Lower, MEC was providing rail service.

[23] Pease V.S., para. 13, fourth [unnumbered] page.

[24] *Id.*

Instead, it reflected respondents' determination not to provide rail service from Topsham.

In summary, after Grimmel's specific request on June 18, 1996, respondents were required by law to provide a rate for the transport by rail of ASR directly from Topsham, and respondents' rate quotes fell short of satisfying that specific obligation. This failure to provide a responsive rate quote, pursuant to which service could be provided, leads to the conclusion that there has been a violation of MEC's common carrier obligation to do so.[25]

Respondents' unresponsive rate quote of June 26, 1996, thus is the first instance in the record where respondents clearly failed to establish a rate for service from Topsham after a specific request. As of that date, then, MEC appeared to be in violation of its common carrier obligation to Grimmel to provide rates for the transportation of ASR from its Topsham facility. Further, it does not appear that respondents have ever issued a rate or rate quote at any time thereafter applicable to service directly from Topsham, even though Grimmel continued to seek such rates.[26] Thus, respondents' apparent failure to comply with their obligation to provide rates for rail transport of ASR from Topsham began on June 26, 1996, and continued until the effective date of the ASR commodity exemption (May 21, 1998).[27]

We will now turn to respondents' principal argument: that, under the particular facts of this case, they were excused from complying with the provisions of section 11101 that otherwise would have required them to supply rates and provide service upon request. Specifically, they assert that providing common carrier service to Grimmel from Topsham potentially could expose them to financial loss, and that their common carrier obligations under the statute

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[25] Mr. Berg concludes his verified statement by claiming, without supporting evidence, that he provided quotes which included rates for carriage from Grimmel's facility at Topsham, and Mr. Pease concludes his verified statement by maintaining that rates were quoted for carriage from Topsham. These bald assertions are belied by the specific facts attested to earlier in their testimony.

[26] Mr. Berg recalls another instance ("on or about May 22, 1997") when Grimmel contacted him for rates for the transport of ASR and scrap metal from Topsham. He notes without further explanation that "[n]o rates were ever published as a result of this contact." Berg V.S. at 5.

[27] We note that Grimmel contends it received a rate quote of $600 per car from MEC at some point between April and June of 1997, that Grimmel requested service pursuant to that rate, and that MEC refused to provide service. Petitioner offers few details about this alleged rate quote, and respondents dispute that it was ever made. Grimmel, in our view, has not demonstrated that such a quote was made. Of course, such a quote, if clearly shown to have been made, could form the basis of a claim for failure to provide service under section 11101(a).

were superseded by such financial considerations.[28] We disagree. Respondents cannot lawfully make fulfilling their statutory obligations contingent upon whether they think it is "worth it" to do so. Rather, a carrier must adhere to its statutory obligations even if it suffers hardship in so doing. *See*, *e.g.*, *Decatur County Comm'rs v. Surface Transp. Bd.*, 308 F.3d 710, 715 (7th Cir. 2002) ("[railroads] may not refuse to provide service merely because to do so would be inconvenient or unprofitable") (citing *G.S. Roofing Prods. Co. v. Surface Transp. Bd.*, 143 F.3d 387, 391 (8th Cir. 1998)); *Classification Ratings on Chemicals, Conrail*, 3 I.C.C.2d 331, 337-38 (1986) (*Classification Ratings*) (railroads may not avoid their obligation to provide rates or service because the commodities in question are hazardous and, if not handled safely, could potentially expose the carriers to substantial financial liability). The only appropriate mechanisms a railroad may employ to excuse itself, permanently or temporarily, from its common carrier obligations on a line of railroad are abandonment or embargo, and MEC has pursued neither. Instead, according to both parties, MEC stated that it was unwilling to provide common carrier service from Topsham unless it could be persuaded that it was in the railroad's financial interest to do so. *See* respondents' reply at 12 ("[MEC] from the start has been willing to serve Grimmel from the Lewiston Lower if Grimmel * * * provide[s] sufficient traffic to cover the cost of such service"); petitioner's rebuttal at 2 ("[MEC] has consistently taken the position that it will not provide service to Grimmel because the cost of rehabilitating the track would exceed the revenues it could realize given Grimmel's status as the sole shipper on the line").

This is not an acceptable response to a shipper's request for rates or service. A rail carrier cannot make its service contingent upon guaranteed profits from that service or upon the shipper's advance funding of repairs to the rail line over

[28] Respondents cite selected abandonment decisions and an embargo decision to support their position that they need not provide common carrier service at a loss – *Illinois Central Gulf R.R. Co.–Abandonment*, 363 I.C.C. 690 (1980), *aff'd sub nom. Bloomer Shippers Ass'n v. ICC*, 679 F.2d 668 (7th Cir. 1982) (*ICG Abandonment*); *Union Pac. R.R. Co.–Abandonment*, STB Docket No. AB-33 (Sub-No. 148X) (STB served October 30, 2000), *reconsideration denied* (STB served February 26, 2001); and *Overbrook Farmers Union–Petition for Declar. Order*, 5 I.C.C.2d 316, 329 (1989) (*Overbrook Farmers*). These cases are inapposite because they deal with a carrier's efforts to have its common carrier obligations permanently extinguished (in the case of abandonments), or temporarily suspended (in the case of an embargo). Here, although they obtained abandonment authority (later withdrawn), respondents clearly have opted against abandoning the line, and they have not issued a temporary embargo. But as *Overbrook Farmers*, a case involving an invalid embargo of an out-of-service line, makes clear, "the proper response to an unprofitable line is to obtain abandonment authority and not to unilaterally withdraw service." *Overbrook Farmers*, 5 I.C.C.2d at 328 (citing *ICG Abandonment*).

which the service would then be provided.[29] At the same time, we note that a rail carrier is under no obligation to set the rate at a level under which it would lose money. We do find that, under the circumstances here (i.e., the Line had not been embargoed or abandoned), MEC had an absolute duty to provide rates and service over the Line upon reasonable request, and that its failure to perform that duty was a violation of section 11101.

Other Matters

Statute of Limitations

Respondents' argument as to the appropriate statute of limitations appears to relate to the damages to which Grimmel may be entitled. Because we do not believe that the court intended to refer to us whether or to what extent petitioner may be entitled to damages, we will not resolve whether the appropriate statute of limitations is 2 years or 4 years. As it may bear on the issue of damages, however, we reiterate our view that respondents' violation of section 11101 began as of at least June 26, 1996, and, because respondents did nothing to remedy this violation, it continued until May 21, 1998, when the ASR exemption took effect.

Respondents' Cross-Petition

In their cross-petition, respondents claim that Grimmel is seeking to apply state law remedies to an alleged failure to provide service under federal law. Respondents have asked us to issue an order declaring that federal law preempts the state law remedies sought by petitioners in connection with count 4 (third-party beneficiary claim) and count 6 (interference with business opportunities claim) of petitioner's amended complaint. We will not issue such an order.

Respondents raised these additional issues before the United States Court of Appeals for the First Circuit in Grimmel's appeal of the District Court's decision dismissing Grimmel's earlier complaint. The First Circuit, in reversing

[29] Although respondents could, as they did, attempt to persuade Grimmel either to fund the rehabilitation of the Lewiston Lower, or, in the alternative, provide traffic or revenue guarantees, the railroad could not insist upon such arrangements, nor could it unilaterally withhold supplying rates and providing service until either precondition was met. Instead, once Grimmel rejected those proposals, respondents had to either repair the line or abandon it.

that decision, held that the District Court has concurrent jurisdiction with the Board over the common carrier issue and directed that that issue be referred to the agency under the doctrine of primary jurisdiction.[30] The First Circuit also stated that the decision to exercise supplemental jurisdiction over the remaining claims was within the discretion of the District Court. By not referring the other counts to us, the District Court has reserved those matters to itself. Under these circumstances, it would serve no useful purpose for us to attempt to reach any conclusion as to either of these counts. However, we have in the past attempted to assist a court in its deliberations by bringing to its attention Board or ICC precedent that may be relevant to the matter before the court.

In this regard, we are unaware of any potentially helpful agency precedent with respect to count 6. As to count 4, however, we have in the past determined that a carrier cannot invoke the preemption provisions of 49 U.S.C. 10501(b) to avoid its obligations under a presumably valid and otherwise enforceable agreement that it has entered into voluntarily, where enforcement of the agreement would not unreasonably interfere with interstate commerce. *See Township of Woodbridge, NJ, et al. v. Consolidated Rail Corp.*, 5 STB 336 (2000), *clarified* 5 S.T.B. 488 (2001).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition is granted to the extent provided herein.
2. Respondents' cross-petition is denied.
3. This proceeding is discontinued.
4. This decision is effective on its service date.

[30] *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 215 F.3d 195 (1st Cir. 2002).

5. Copies of this decision will be served upon the United States District Court for the District of Maine as follows:

The Honorable Gene Carter
156 Federal Street
Portland, ME 04102
and
William S. Brownell
Clerk - U.S. District Court
156 Federal Street
Portland, ME 04102

By the Board, Chairman Nober and Commissioner Morgan.